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IN THE

Supreme Court of the United States

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No. [redacted]

AMERICAN CAN COMPANY, a New Jersey corporation,

Petitioner,

v.

STATE OF NEW JERSEY, by Hugo A. Hilgendorff, Jr., Attorney-at-Law specially designated by the Attorney General of the State of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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On the Petition.

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STATE OF NEW JERSEY, by Hugo A. Hilgendorff, Jr., Attorney-At-Law specially designated by the Attorney General of the State of New Jersey,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT.

Petitioner, American Can Company prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled action on March 16, 1964.

Opinions Below.

The oral opinion of the Chancery Division of the Superior Court of New Jersey (A49a-20 to A53a-40)[1] is

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[1] References to the record as presented to the Court below are preceded by the symbol "A". This portion of the record is printed in a separate appendix to this Petition. References to applicable statutes and to proceedings in the Supreme Court of New Jersey are preceded by the symbol "App." and are printed in the Appendix annexed to this Petition.

unreported. After appeal from the decision of the Chancery Division to the Appellate Division of the Superior Court of New Jersey (A55a-1 to 40) and prior to oral argument, the case was certified directly from that Court to the Supreme Court of New Jersey (App. D). The opinion of the Supreme Court of New Jersey is reported at 42 N. J. 32, 198 A. 2d 753 (1964) (App. B)

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on March 16, 1964 (App. C). No rehearing was applied for nor has any extension of time within which to file this petition been sought. The Statutory provision which grants jurisdiction to this Court to review the judgment of the Supreme Court of New Jersey is 28 U. S. C. 1257(3).

Questions Presented.

1. Is this Court's holding in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961) that (a) competing state claims under state escheat laws to specific property held by a multi-state corporation are to be litigated in the Supreme Court of the United States, and (b) that it is violative of the Due Process Clause of the United States Constitution to adjudicate such claims in a State Court, *retroactive* so as to render void a judgment of escheat entered prior to this Court's decision in *Western Union*?

2. Is not the Supreme Court of the United States the only appropriate forum for the disposition of claims of competing states under their respective escheat laws to property held by Petitioner, a multi-state corporation?

3. Is not a State Court judgment of escheat respecting property of Petitioner claimed by another State absolutely void and of no effect?

Constitutional Provisions and Statutes Involved.

The Statute upon which the State of New Jersey based it claim and pursuant to which the New Jersey Courts required Petitioner to pay over monies in its possession to the Treasurer of the State of New Jersey is N. J. S. A. 2A:37-29, et seq., the so-called "Custodial Escheat Act of New Jersey", which provides:

> "In addition to the method provided for the escheat generally of personal property as defined in article 2 of this chapter, an alternate method may be employed in certain cases defined in this article 3. By this latter method the state may take into its protective custody property consisting of cash, dividends, interest or wages owed by any corporation organized or doing business under the laws of this state, belonging to any person remaining unknown, or whose whereabouts is unknown, or whose property remains unclaimed as defined herein for a period of 5 successive years; and after a period of protective custody has expired as herein prescribed, the state may proceed to escheat such property to itself."[2]

Petitioner does not assert here, nor did it claim below, that the Custodial Escheat Act of New Jersey is unconstitutional. What has been asserted is that utilization of the Act by the State of New Jersey to escheat property in the possession of Petitioner, which is the subject of a claim by another state, is unconstitutional under the Due Process Clause of the United States Constitution which provides:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .". U. S. Const. amend. XIV, §1.

[2] The entire "Custodial Escheat Act of New Jersey" is printed in Appendix A to this Petition.

This is so inasmuch as this Court has held in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961), that the use by one State of its escheat laws to acquire property claimed by another State under its escheat laws is unconstitutional under the Due Process Clause because (1) a State Court has no power to escheat such property in the face of the competing claim of another State since its judgment cannot protect the judgment-debtor from double liability, and (2) the proper forum to settle such controversies is the Supreme Court of the United States.

Statement of the Case.

A. Introductory:

This is a petition for a writ of certiorari to the Supreme Court of New Jersey in which Petitioner seeks review of that Court's judgment of March 16, 1964 (App. C) affirming the judgment of the Chancery Division of the Superior Court of New Jersey (A54a-1 to 40) denying Petitioner's motion (A48a-1 to A49a-15) for an order relieving it from and vacating and setting aside the judgment of escheat entered against American Can Company on September 16, 1960 (A22a-1 to A24a-40) and thereafter amended on December 16, 1960 (A26a-1 to 25) and on June 16, 1961 (A45a-25 to A47a-40).

These judgments were entered pursuant to N. J. S. A. 2A:37-29, et seq., the "Custodial Escheat Act of New Jersey" (App. A), and required Petitioner to deliver to the State Treasurer of New Jersey the sum of $39,847.18 which represented dividends, wages, and general cash obligations unclaimed for more than five years. Petitioner sought to set these judgments aside after the decision of this Court in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961) on the ground that the Superior Court

of New Jersey had no authority to enter such a judgment and that it was entered without due process of law. The motions for relief from the judgments aforesaid were denied and this denial was affirmed by the Supreme Court of New Jersey.

B. Procedural History:

On December 21, 1959, the State of New Jersey filed and served its Complaint against Petitioner (A1a-1 to A2a-40) and obtained an Order to Show Cause (A3a-1 to A4a-15) seeking custody of monies which it alleged were in Petitioner's custody or possession and which had remained unclaimed by its owners for five successive years, N. J. S. A. 2A:37-29, et seq. (App. A).

Petitioner's answer (A4a-20 to A9a-40) as amended (A14a-25 to A16a-25) raised as a defense the fact that the State of California, pursuant to its Uniform Disposition of Unclaimed Property Act, was asserting a claim against Petitioner for a portion of the same dividends and wages being claimed by New Jersey; that California was therefore a necessary and indispensable party to the action without whose presence no valid judgment could be entered; that the New Jersey Custodial Escheat Act contemplated absolute protection against double liability; that this protection could not be given to it by a judgment of the Superior Court of New Jersey (A45a-35 to A46a-15). The Pretrial Order as amended (A10a-1 to A14a-20; A26a-30 to A30a-40) raised the same issues.

On September 16, 1960, the Superior Court of New Jersey, Chancery Division, entered its Findings of Fact and Conclusions of Law (A16a-30 to A21a-40) with respect to all of the monies to which New Jersey sought custody, saving $1,896.19 which was the subject of the claim by California. The disposition of this amount was to be determined following the filing of briefs and oral argument.

Thereafter, on March 29, 1961, the Superior Court of New Jersey, Chancery Division, decided that Petitioner's contentions respecting the constitutionality of New Jersey's custodial escheat procedure in face of California's claim were without merit.[3] In its opinion, the Court noted that pending before the Supreme Court of the United States was *Western Union Telegraph Co.* v. *Pennsylvania, supra,* and commented that it did not find *Western Union* pertinent since it was "not on all fours with this one" (A43a-20 to 30).

On December 4, 1961, this Court handed down its decision in *Western Union* holding that a State Court had no power to enter a judgment of escheat in the face of competing state claims and that it was violative of the Due Process Clause of the United States Constitution to attempt to do so.

Petitioner then moved to set aside the judgment entered against it on June 16, 1961 (A45a-25 to A47a-40; A48a-1 to A49a-15). The Chancery Division of the Superior Court of New Jersey denied the motion (A49a-15 to A53a-40; A54a-1 to 40). Petitioner appealed to the Appellate Division of the Superior Court of New Jersey (A55a-1 to 40) and filed its briefs in that Court. Prior to argument, the Supreme Court of New Jersey certified the case directly to it for argument and decision (App. D). That Court affirmed the judgment of the Superior Court of New Jersey denying Petitioner's motion to set aside the prior judgments of escheat on the grounds aforesaid (App. C).

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[3] The Court had before it on that day the companion case of *State of New Jersey* v. *R. J. Reynolds Tobacco Co.* where identical issues were raised. The Court's opinion in *Reynolds* respecting these issues was delivered orally and transcribed, and is printed in full in the Appendix (A36a-10 to A45a-20). The Court then adopted its opinion in *Reynolds* as its opinion in the instant case (A35a-1 to A36a-10) and incorporated same, as the Court's Findings of Fact and Conclusions of Law in its judgment (A45a-25 to A47a-40).

C. Federal Questions Raised Below:

From the foregoing, it is evident that no appeal was taken from the original judgment in the Chancery Division of the Superior Court of New Jersey granting to the State of New Jersey custody of the wages and dividends which were the subject of the competing claims of New Jersey and California. However, in its answer filed in that case, Petitioner insisted that California was an indispensable party to any proceeding involving the intangibles sought by New Jersey (A8a-20 to 40). The Court recognized the constitutional issues raised by this defense in its opinion in the original proceeding wherein the Court commented:

> "I don't feel that the defendant [Petitioner here] has been deprived of due process of law, since the amounts are subject to control by the State of New Jersey and even though the defendant might be subject to a suit for multiple liability." (A44a-10 to 26). (Brackets Added)

Following this Court's decision in *Western Union*, Petitioner moved, pursuant to Rule 4:62-2 of the Rules of the Supreme Court of New Jersey to vacate and set aside the unappealed judgment entered against it by the Superior Court of New Jersey on June 16, 1961 on the ground, *inter alia:*

> "The judgment was entered in violation of due process of law and the defendant's [Petitioner here] rights under the Fourteenth Amendment to the United States Constitution." (A48a-10 to 35). (Brackets Added)

The Court's denial of Petitioner's motion, contained in its Order of April 24, 1963 (A54a-1 to 40), was appealed in its entirety to the Appellate Division of the Superior Court of New Jersey (A55a-1 to 40) in which appeal one of the specific questions involved was:

> "Should a judgment obtained in violation of constitutional due process requirements and therefore void be declared a nullity?" (Certified Transcript of Record of Proceedings in Superior Court of New Jersey.)

Further, Petitioner's brief below advanced the contention that:

> "The judgment entered in the Court below authorizing the taking into custody of monies by the State of New Jersey was entered without due process of law". *State* v. *American Can Co.*, 42 N. J. 32 at 41, 198 A. 2d 753 and 757 (1964).

Thus, the constitutional question involved herein was timely and properly raised so as to give this Court jurisdiction to review the judgment of the Supreme Court of New Jersey on writ of certiorari.

Reasons for Granting Writ of Certiorari.

1. The judgment of the Supreme Court of New Jersey in essence retrospectively validates hundreds of judgments erroneously entered prior to this Court's decision in *Western Union Telegraph Co.* v. *Pennsylvania, supra.* As the New Jersey Supreme Court noted in its opinion:

> "There are admittedly many hundreds of similar escheat judgments outstanding in addition to those entered against the defendant." *State* v. *American Can Co.*, 42 N. J. 32 at 43, 198 A. 2d 753 at 759.

There are, therefore, special and important reasons for reviewing that Court's judgment on writ of certiorari if only to determine finally the status of judgments which, if entered today, concededly would violate the constitutional concepts pronounced in *Western Union.* This Court noted in *Western Union Telegraph Co.* v. *Pennsylvania, supra* that:

> "The rapidly multiplying State Escheat Laws, originally applying only to land and other tangible things, but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the state and persons whose rights will be adversely affected by escheats."

The decision of both Courts below implicitly recognized that had the decision of this Court in *Western Union* preceded the judgment of the Superior Court of New Jersey filed on June 16, 1961, that judgment would not have been entered. The opinions of the Courts below concede that the entry of the judgment as to that portion of the escheated funds claimed by California was clearly violative of due process requirements enunciated in *Western Union*. Therefore, the clear impact of the decision below is that an escheat judgment, admittedly entered in violation of Petitioner's rights under the Due Process Clause of the Constitution, cannot be subsequently attacked as void.

We urge that this decision clearly controverts the principles espoused by this Court in *Western Union* to the effect that:

> ". . . the holder of such [intangibles] is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction". *Western Union Telegraph Co.* v. *Pennsylvania*, *supra*, at 75. [Brackets Added]

If the decision of the Supreme Court of New Jersey is allowed to stand, a vital and lasting precedent affecting the administration of state escheat laws will be established permitting the State's retention of monies admittedly taken in violation of due process requirements. And multi-state corporations, like Petitioner, will be required to defend ever increasing state claims to escheated intangibles already paid over under escheat judgments entered prior to *Western Union*.

2. Great weight was given by the Court below to the fact, not denied, that Petitioner did not appeal from the original judgment. This decision was made in the light of this Court's decision in *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428 (1951). *Western Union's* illumination of the *Standard Oil* doctrine resulted in Petitioner's motion to vacate which was denied by both Courts below. Seizing upon Petitioner's decision not to appeal the original judgment, the New Jersey Supreme Court relied in great part upon principles of *res adjudicata* and waiver citing *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1930); *Chicot Co. Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1939); and *Ackermann* v. *United States*, 340 U. S. 93 (1950). In approaching the case from this standpoint, the Court below failed to consider this Court's approach to the problem of judgment finality in *Polites* v. *United States*, 364 U. S. 426 (1960). Therein this Court found that the rigid and doctrinaire application of principles of finality of judgments would not always be a just one, and noted at Page 433:

> "Despite the relevant and persuasive force of *Ackermann* v. *United States*, however, we need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in the governing law."

Flexibility should be the touchstone in a case such as this where the judgment complained of was admittedly entered without due process.

3. This Court noted in *Western Union:*

> "That controversies between different states over their right to intangibles be settled in a forum where all the states that want to do so can present their

> claims for consideration and final authoritative determination. Our Court has jurisdiction to do that."

Whether State Courts, such as the courts of New Jersey, can, once presented with a competing state claim, as in the case at bar, exercise jurisdiction is a question which should be decided by this Court. Does not the injection of a competing state claim into what was originally an intra-state controversy raise serious questions as to the inherent power and authority of a State Court to adjudicate the claim? Is this not "the plain usurpation of power" by a Court denounced in cases such as *In Re Burris*, 136 U. S. 586 (1890); *In Re Sawyer*, 124 U. S. 200 (1888); and *United States* v. *Walker*, 109 U. S. 258 (1883). If it is a plain usurpation of power to adjudicate a claim of one state to intangibles held by a multi-state stakeholder with notice of another state's claim, is not the resulting judgment an absolute nullity? The Court below dismisses this contention with the brief comment at 42 N. J. 38, 198 A. 2d 756, that:

> "In the light of the then prevailing circumstances (including the decision in *Standard Oil Co.* v. *New Jersey*, *supra*) the judgments entered by Judge Kingfield, and the hundreds of earlier escheat judgments, may not now fairly be treated as plain usurpations of power and therefore void."

We urge that this determination essentially ignores the very serious question, which should be settled by this Court, that a State Court totally lacks authority to enter a valid judgment when notified of a competing claim by another state.

We recognize that Article 3, Section 2, Cl. 2 of the United States Constitution[4] does not confer exclusive jurisdiction

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[4] "In all cases affecting Ambassadors, other public Ministers and Consuls, *and those in which a State shall be Party*, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

on this Court in cases in which a State shall be a party, *Ames v. Kansas*, 111 U. S. 449 (1884). But Congress has not bestowed jurisdiction on the State Courts of New Jersey to compel another State to become a party to escheat litigation, and this Court in *Western Union* stated that only it had such power. It has recently exercised this power in *Texas* v. *New Jersey*, et al, No. 13 Original. See 370 U. S. 929 (1962) and 372 U. S. 973 (1963).

The unanswered question of Federal pre-emption of multi-state escheat litigation, it seems to us, demonstrates even further the weakness of the reasoning of the Court below in applying the doctrine of finality to the facts of the case, *Kalb* v. *Fuerstein*, 308 U. S. 433 (1940); *United States* v. *United States Fidelity and Guaranty Co.*, 309 U. S. 506 (1940).

We suggest that the administration of state escheat laws requires review of the judgment below. If this Court's decision in *Western Union* "creates more problems than it solves", *Western Union* v. *Pennsylvania*, *supra* at Page 86, this is the opportune time for their solution.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutory Provisions Cited.

ARTICLE 3. PERSONAL PROPERTY; ALTERNATE METHOD.

2A:37-29. Summary of Alternate Method

In addition to the method provided for the escheat generally of personal property as defined in article 2 of this chapter, an alternate method may be employed in certain cases defined in this article 3. By this latter method the state may take into its protective custody property consisting of cash, dividends, interest or wages owed by any corporation organized or doing business under the laws of this state, belonging to any person remaining unknown, or whose whereabouts is unknown, or whose property remains unclaimed as defined herein for a period of 5 successive years; and after a period of protective custody has expired as herein prescribed, the state may proceed to escheat such property to itself.

2A:37-30. When Alternate Method Is Available; Summary Action.

Whenever a corporation organized under the laws of this state shall have custody or possession of, or shall have deposited with or given to an agent or trustee residing within or without the state custody or possession of, any moneys which are or shall be payable to any person as a dividend upon the capital stock, preferred or common, of the corporation, or as interest payable upon the corporation's bonds, indentures, notes or other formal instruments evidencing the indebtedness of the corporation, or any moneys payable as wages from the corporation to any person, and whenever any person or any corporation organized under the laws of any other state and authorized to do business in this state shall have custody or possession of

any moneys payable by such person or corporation to any person as wages earned within this state, or of any moneys otherwise having a situs within this state, which moneys are payable to any one person in any of the categories above enumerated and the owner of, beneficial owner of, or person entitled to the same has been and remains unknown for the period of 5 successive years, or the whereabouts of such person has been and remains unknown for the period of 5 successive years, or such personal property has been and remains unclaimed for the period of 5 successive years, then the superior court may in a summary action brought in the name of the state of New Jersey by the attorney general or such attorney-at-law as he may designate, direct the corporation or other person aforesaid to deliver such moneys to the state treasurer for safekeeping.

2A:37-31. Moneys delivered upon service of judgment

Upon the entry of the judgment in the action, a copy of the judgment shall be served upon the corporation, or other person aforesaid, who shall forthwith deliver the said moneys to the state treasurer, together with a list of the individual amounts; the names, if known to the corporation or other person aforesaid, of the owners or beneficial owners of, or persons entitled to, such moneys, the last-known address of such persons, and any other information he may have relating to the last-known address of any person having an interest in, together with any other information relating to, such personal property or the whereabouts of such owner.

2A:37-32. Mailing of notices

The state treasurer shall thereupon mail a letter or post card to each person named in the list, to his last-known address, as shown by such list, informing him that the state treasurer holds such moneys in the amount designated in the list as his property, for the benefit of the person therein named, and that if said person does not, in writing, make claim to such moneys within 2 years from the date of such

notice, an action will be instituted to escheat such moneys to the state in conformity with this article. The state treasurer shall also mail a similar notice to the attorney general of the state where such person had his last known address, if such address is without the state of New Jersey, advising him to present any claim that such state might have to such money. If a claim is made to the state treasurer within such period of 2 years, and he shall determine that the claim is valid, he shall pay the moneys so claimed to the person entitled thereto. If the state treasurer shall determine that the claim is not valid, he shall reject the claim. The claimant may thereupon apply to the superior court, chancery division, for a review of his determination, and the claim shall thereupon be heard and determined, de novo.

2A:37-33. PAYMENT TO OPERATE AS A RELEASE

The payment of the said moneys by the corporation or other person to the state treasurer pursuant to the provisions of this article shall, as respects such moneys, automatically operate as a full, absolute and unconditional release and discharge of the corporation or other person from any and all claims, demands or liability to the person whose moneys have been paid to the treasurer, and such payment may be pleaded as an absolute bar to any action brought against such corporation or other person by any person whatsoever. Any right to such moneys which any claimant may have shall thereby be transferred against, and shall become the obligation of, the state.

2A:37-34. MONEY TO ESCHEAT TO STATE

If moneys so deposited with the treasurer shall remain unclaimed for the period of 2 years from the date of the mailing of the letter or post card to the person listed as the owner (after the 5-year period such moneys were in the custody or possession of the corporation or of its agent or trustee), the said moneys shall escheat to the state and the treasurer shall inform the attorney general thereof.

2A:37-35. Escheator's fee

After the judgment directing that the person or corporation shall forthwith deliver said moneys to the state treasurer shall have been complied with as provided in section 2A:37-31 of this title, the state treasurer shall so inform the court. Whereupon the court shall direct that there be paid to the escheater, if any, 5% of the moneys so paid to the state treasurer, and also fix and direct the payment of the fees and expenses of the attorney-at-law who shall have prosecuted the action.

2A:37-36. Action in superior court; hearing

The attorney general, or the attorney-at-law, designated by him, shall thereupon bring, in the name of the state of New Jersey, a summary action in the superior court for the escheat of the said moneys to the state of New Jersey. The hearing in the action shall be not less than 20 days nor more than 40 days after the commencement of the action.

2A:37-37. Notice

The court shall provide for notice of the action by directing that a notice as stated in section 2A:37-38 of this title be posted in the place in the state capitol specified by the court where other notices required to be posted are customarily posted, such posting to be made not less than 20 days before the date fixed for the hearing. If the amount of money or property to be escheated in the case of any one person exceeds $5, then as to him the escheat notice shall be published once a week for 2 successive weeks in a newspaper of general circulation in Mercer county or such other county as the court shall designate, the last publication to be made not less than 20 days before the date fixed for hearing; but if such amount is less than $5, the court may by order dispense with publication.

A copy of such notice shall also be mailed to the last known address of the person whose property is to be escheated and if such address is without this state, then to the attorney general of the state where such person had his last known address.

2A:37-38. The contents of the notice

Such notice shall be directed to the owners or beneficial owners of the moneys so deposited with the state treasurer and all other persons whatsoever having or claiming any interest therein. The notice shall be in the form approved by the court and shall contain substantially the following matters:

a. The filing of the complaint in the action for escheat;

b. The names and last known addresses of the owners or beneficial owners of, or persons entitled to, such moneys;

c. A statement that such owners or beneficial owners or persons or their whereabouts have been unknown, and such moneys have been unclaimed, for more than 7 years;

d. The amounts of the moneys;

e. The name of the corporation or other person who paid the moneys to the state treasurer;

f. The nature of the obligation of the corporation or other person by reason of which the moneys were paid to the state treasurer;

g. The place, time and date of the hearing; and

h. A direction that at a specified time before the hearing anyone who claims the moneys or any portion thereof or claims the same should not escheat shall file with the clerk of the court his claim and at the time and place fixed for the hearing appear in person or by duly authorized counsel to substantiate his claim.

Where the name of the owner is not known or there is no information as to the last known address of the owner, the notice shall state such fact. The notice may contain such other matter or information as the court may deem proper.

2A:37-39. To escheat to state.

If no person shall file a claim or appear at the hearing to substantiate a claim, or where the court shall determine

that a claimant is not entitled to the moneys claimed by him, then, in either event, the court shall enter a judgment that the personal property described in the complaint has escheated to the state.

2A:37-40. Court may reopen proceedings

At any time within 7 years after the entry of a judgment in escheat, the court may, upon a proper showing and sufficient proof that the claimant did not have actual knowledge of the action for escheat, reopen the same and amend the judgment in whole or in part, and in such amended judgment direct the state treasurer to repay to the claimant the moneys to which he is entitled, together with interest at 2% from the date of the original judgment.

2A:37-41. Moneys placed in separate fund; use

After the state treasurer shall have received into his custody any property or moneys as provided in this article, he shall place the same in a separate fund pending its final disposition by the court. It shall be lawful for him to invest any part of such fund temporarily in the obligations of the state or any subdivision thereof. It shall also be lawful for him to advance up to 90% of the fund as a temporary loan for the use of any department of the state, to be repaid when the custodial fund shall have been finally disposed of by the court through escheat or otherwise, provided such temporary loan shall have been approved by the governor and the legislature. When such funds in his hands shall have become escheatable it shall be his duty to notify the attorney general so that the attorney general may proceed to escheat the said moneys or property in conformity with the provisions of this article.

2A:37-42. Attorney general notified of escheatable property

It shall be the duty of any attorney, surrogate, administrator, executor, or any other person having knowledge or information concerning any escheatable property as defined

herein, to notify the attorney general of this state within a reasonable time, of the existence of such escheatable property.

2A:37-43. Treasurer authorized to repay

Whenever it shall appear to the satisfaction of the state treasurer or his representative that a person is the lawful owner of any moneys that have heretofore been received by the treasurer under the provisions of this article, and that such moneys are less than $50 the state treasurer is hereby authorized and empowered to repay to the lawful owner aforesaid the moneys so received without the necessity of reopening the judgment theretofore entered.

2A:37-44. Effect upon proceedings already commenced

Whenever a proceeding to escheat personal property has been commenced in the former court of chancery, or in the superior court and shall be pending in the superior court, the complaint may be amended at any time to include proceedings under the alternate method provided in this article and the cause shall then proceed accordingly. If the cause has proceeded to decree or judgment before this article shall have become effective, it shall be lawful to reopen the judgment or otherwise proceed under the provisions of this article as to property or moneys escheatable under the article and not escheated by such judgment and to this end to proceed against such moneys or property and to take the same into protective custody or otherwise and thereafter to escheat such property or moneys notwithstanding such judgment.

The entry of a judgment of escheat shall not prevent the state from thereafter proceeding against the holder of other property or moneys found to be in such holder's possession or which by further lapse of time has become subject to protective custody or escheat.

APPENDIX B.

Opinion of New Jersey Supreme Court.

SUPREME COURT OF NEW JERSEY

No. A-64, September Term, 1963.

State of New Jersey, by Hugo A. Hilgendorff, Jr., Attorney-at-Law specially designated by the Attorney General of the State of New Jersey, Plaintiff-Respondent,

vs.

American Can Company, a New Jersey corporation, Defendant-Appellant.

Argued January 20, 1964. Decided

Mr. John C. Heavey, Jr. argued the cause for the appellant (Messrs. Carpenter, Bennett & Morrissey, attorneys; Mr. Samuel M. Coombs, Jr., of counsel).

Mr. Charles J. Kehoe, Deputy Attorney General, argued the cause for the respondent (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney; Mr. Hugo A. Hilgendorff, Jr., of counsel and on the brief).

The opinion of the Court was delivered by Jacobs, J.

In 1960 a partial judgment in the sum of $37,950.99 was entered in the plaintiff's favor with the defendant's consent. In June 1961 a judgment for the plaintiff in the additional sum of $1,806.19 was entered. No appeal was taken from either judgment within the time allowed, or indeed at any time, and both judgments were fully paid. Thereafter

in July 1962 the defendant moved for relief under R. R. 4:62-2. Its motion was denied by Judge Kingfield and its appeal from the order of denial was certified by us before argument in the Appellate Division.

The plaintiff State of New Jersey's complaint was filed in 1959; it sought custodial escheat under N. J. S. 2A:37-29 *et seq.* of unclaimed dividends, interest, wages and other cash obligations in the possession of the defendant American Can Company, a corporation of New Jersey. In due course the defendant filed an answer which set forth that it possessed unclaimed property in the sum of $39,972.98 which might be taken into custody by the plaintiff; it asserted no defense to New Jersey's custodial claim except with respect to a small portion thereof ($2,171.32) which it alleged was also being claimed by the State of California. Its answer asserted by way of separate defense that California was an indispensable party and that the amount of its claim should be eliminated from the proceeding. In a pretrial order the defendant stipulated that the State of New Jersey was entitled to custodial escheat of the property in its custody (less the amount being claimed by California) and that a partial judgment to that effect could be entered immediately. On September 16, 1960 findings of fact and conclusions of law were entered by Judge Kingfield; after referring to the defendant's consent to the entry of partial judgment, the conclusions expressly set forth that the State was entitled to custody, that its custodial escheat act was intended to furnish absolute protection against double liability and that to that end the State waived any claim of sovereign immunity. A judgment dated September 16, 1960 incorporated the findings of fact and conclusions of law, directed that the defendant pay the sum of $37,711.30 to the State of New Jersey, and retained jurisdiction for the purpose of granting reimbursement in the event the defendant is subjected to double liability. To correct an inadvertency the September 16th judgment was amended on December 16, 1960 to indicate that California's claim was in the amount of $1,896.19 (instead of $2,171.32 as theretofore asserted) and that partial judgment was in the sum of

$37,950.99 (instead of $37,711.30 as theretofore entered). The defendant delivered its check for $37,950.99 to the Treasurer of New Jersey and a warrant for satisfaction was duly filed.

On March 29, 1961 Judge Kingfield passed on the issues which related to the sum claimed by California as well as New Jersey. He determined that the New Jersey court had jurisdiction to adjudicate the matter, that California was not an indispensable party, that New Jersey could take custody under its custodial escheat act without depriving the defendant of due process, and that the defendant could be given absolute protection against double liability by a reservation of jurisdiction in the judgment. In his determination, the Judge expressly incorporated an opinion he had filed in another case where he had referred to *Commonwealth* v. *Western Union Tel. Co.*, 400 Pa. 337, 162 A. 2d 617 (1960), then pending on appeal before the United States Supreme Court. There Pennsylvania had escheated property which was in the possession of Western Union, a New York corporation; the property was also being actively claimed by New York. Judge Kingfield first considered withholding his decision until the Supreme Court's opinion was handed down but then concluded to decide the matter, noting (1) that since Pennsylvania had an absolute escheat act in contrast to New Jersey's custodial escheat act, the Pennsylvania case was not on all fours with the one before him, and (2) that if either party was dissatisfied with his determination, appeal could be taken and a dispositive ruling obtained. On June 16, 1961 he entered a judgment for the State of New Jersey in the sum of $1,896.19. His judgment concluded with a retention of jurisdiction for the purpose of granting reimbursement in the event the defendant is subjected to double liability. The defendant did not appeal from the judgment and paid it in full.

On December 4, 1961 the Supreme Court filed its opinion in *Western Union Tel. Co.* v. *Pennsylvania*, 368 U. S. 71, 7 L. Ed. 2d 139 (1961), reversing Pennsylvania's judgment of

escheat in *Commonwealth* v. *Western Union Tel. Co., supra.* On July 17, 1962 the defendant American Can Company filed a notice of motion under R. R. 4:62-2 seeking to be relieved of the escheat judgment against it. The grounds set forth in the notice were (1) the judgment was void, (2) it was entered in violation of due process and the defendant's rights under the fourteenth amendment, and (3) for "other reasons justifying relief." After hearing argument Judge Kingfield denied the motion. In attacking his ensuing order, the defendant's brief embodies points which allege that the judgment was void and was entered without due process, and that the lower court had abused its discretion and had ignored the terms of the judgment in refusing to grant the equitable relief sought by the motion. Although the defendant's motion and the points in its brief refer in terms to but one judgment, there were in fact two judgments entered at different times and involving different elements. They are properly to be viewed and dealt with as separate judgments for purposes of the present proceeding. *Cf. Applestein* v. *United Board & Carton Corp.*, 35 N. J. 343 (1961).

The early common law doctrine of escheat was associated with real property; it was an incident of tenure and related to the right of the lord to take for want of a tenant. Later the doctrine was extended to personal property which had no owner or whose owner or owner's whereabouts was unknown. In 1946 the New Jersey Legislature asserted its sovereign power to appropriate such personal property within its borders by the passage of an absolute escheat act. L. 1946, c. 155; N. J. S. 2A:37-11 *et seq.* That act was held to be a constitutional exercise of legislative power and many proceedings were brought under it. *State* v. *Standard Oil Co.*, 5 N. J. 281 (1950), *aff'd sub nom., Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 95 L. Ed. 1078 (1951). In 1951 the New Jersey Legislature passed a custodial escheat act which provided an alternative method for taking custody of (and thereafter escheating) personal property. L. 1951, c. 304; N. J. S. 2A:37-29 *et seq.* This act was upheld and hundreds of Superior Court proceedings were prosecuted in

accordance with its terms. See *State* v. *Thermoid Co.*, 16 N. J. 274 (1954); *State* v. *American-Hawaiian Steamship Co.*, 29 N. J. Super. 116 (Ch. Div. 1953); *cf. State* v. *United States Steel Corp.*, 22 N. J. 341, 347 (1956). Thus when in 1959 the State of New Jersey instituted its custodial escheat action against the defendant American Can Company there was no question as to the jurisdiction of the Superior Court to entertain it. Personal jurisdiction was present because there was due service of process on the defendant and jurisdiction of the subject matter was present because the court had power to determine cases of the class to which the action belonged. See *Abbott* v. *Beth Israel Cemetery Ass'n*, 13 N. J. 528, 537 (1953); *State* v. *Osborn*, 32 N. J. 117, 122 (1960); 7 *Moore, Federal Practice*, para. 60.25 [2], at 264 (2d ed. 1955). When the Superior Court entered the partial judgment of $37,950.99 in 1960 (with the defendant's consent) it clearly had jurisdiction to do so and the same was true when it entered the 1961 judgment in the additional sum of $1,896.19. Neither judgment was in any view subject to attack as being void. See *West Jersey Trust Co.* v. *Bigham*, 118 N. J. L. 160, 161 (E. & A. 1937); 7 *Moore*, *op. cit. supra*, para. 60.25, at 257 *et seq.* As Professor Moore has pointed out, policy considerations strongly dictate that the concept of void judgments be restricted and that unappealed civil judgments* not be dealt with as void except where there has been a plain usurpation of power. In the light of the then prevailing circumstances (including the decision in *Standard Oil Co* v. *New Jersey*, *supra*) the judgments entered by Judge Kingfield, and the hundreds of earlier escheat judgments, may not now fairly be treated as plain usurpations of power and therefore void.

* We are not at all concerned here with criminal proceedings where judgments have been subjected to post-conviction attack with increasing frequency because of the broadening concepts as to the proper scope of inquiry on habeas corpus. See *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 (1938); *Fay* v. *Noia*, 372 U. S. 391, 9 L. Ed. 2d 837 (1963); *cf. State* v. *Cynkowski*, 10 N. J. 571, 576 (1952); *In re Rose*, 122 N. J. L. 507, 509 (Sup. Ct. 1939). See also *Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N. Y. U. L. Rev. 78 (1964).

Western Union limited the sweep of *Standard Oil* (*cf.* Note, 62 Colum. L. Rev. 708 (1962)) by holding that where two or more states are actually seeking to escheat the same property, state courts may not entertain jurisdiction, thus leaving the disputing states to seek original relief in the Supreme Court. It would appear to have no bearing whatever on the 1960 consent judgment which dealt entirely with property never claimed and not now being claimed by any state other than New Jersey. Nor would it appear to have any effect on the validity of the 1961 judgment which, though it involved property claimed by two states, became final before the decision in *Western Union* and was never appealed from. See *Chicot County Drainage Dist.* v. *Baxter*, 308 U. S. 371, 84 L. Ed. 329 (1940); *Miller* v. *McCutcheon*, 117 N. J. Eq. 123 (E. & A. 1934). In *Chicot County* a federal district court approved a plan of readjustment and enjoined bondholders from enforcing their claims except on the terms provided in the plan. No appeal was taken from the court's decree. Later, the statute under which the district court had acted was declared to be unconstitutional. Bondholders then sued, asserting that the decree barring them was nullified and their contention was sustained in the district court and in the circuit court of appeals. The Supreme Court unanimously reversed, rejecting the notion that the declaration of unconstitutionality voided the legal proceedings which had taken place prior thereto.

In the course of his opinion in *Chicot County*, Chief Justice Hughes relied on principles of res judicata and pointed out that by approving the readjustment, the district court had passed on its own jurisdiction and that, while its determination could have been reviewed on appeal, it could not be attacked collaterally as void even though the statute under which the court had acted was later declared unconstitutional.** Earlier, in *Treinies* v. *Sun-*

** No question has been raised as to whether the present attack by American Can Company is to be viewed technically as collateral or direct; assuming it to be direct (7 *Moore*, *supra*, at p. 261), the principles expressed in *Chicot County* are nonetheless applicable

shine Mining Co., 308 U. S. 66, 78, 84 L. Ed. 85, 93 (1939), Justice Reed noted that the principles of res judicata apply to all types of issues including issues of jurisdiction over the subject matter as well as the person; and his approach finds solid support in the recent opinion in *Durfee* v. *Duke*, U. S. , 11 L. Ed. 2d 186, 192 (1963). See also *Sherrer* v. *Sherrer*, 334 U. S. 343, 350, 92 L. Ed. 1429, 1435 (1948); *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503, 85 L. Ed. 297, 302 (1941); *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26 (1938); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 524, 75 L. Ed. 1244, 1246 (1931). Despite the breadth of these expressions, occasional instances may be found where res judicata has flexibly given way to counter policies which were deemed more important and thus adequate to justify collateral attack upon the jurisdictional determination; they may be found collected in *Duke* v. *Durfee*, 308 F. 2d 209 (8th Cir. 1962), *rev'd*, U. S. , 11 L. Ed. 2d 186 (1963), but examination readily discloses that they have little or nothing in common with the situation at hand.*** Here the jurisdictional issue was fairly tried and determined adversely to the defendant which then deliberately chose not to seek further review though the availability of appeal and the

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and dictate rejection of the efforts to vacate the 1960 and 1961 judgments as void. See *Jackson* v. *Irving Trust Co.*, *infra*, 311 U. S. 494, 85 L. Ed. 297; *Elgin Nat. Watch Co.* v. *Borrell*, 213 F. 2d 776 (5th Cir. 1954); *Miller* v. *McCutcheon*, *supra*, 117 N. J. Eq. 123; *cf. Comment, The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 Yale L. J. 526 (1957).

*** See, *e.g.*, *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370 (1940), where a foreclosure decree against a farmer was subjected to collateral attack in a proceeding under a special bankruptcy act dealing with farm debtors and their property; the court noted that while it was generally true that a judgment of a court of competent jurisdiction bears a presumption of regularity and is not subject to collateral attack, Congress may by specific bankruptcy legislation "create an exception to the principle and render judicial acts with respect to the person or property of a debtor whom the bankruptcy law protects, nullities and vulnerable collaterally." 308 U. S. at 438-439, 84 L. Ed. at 374. See also *Boskey & Bratcher, Jurisdiction and Collateral Attack*, 40 Colum. L. Rev. 1006, 1016, (1940).

pendency of *Western Union* were specifically called to its attention. *Cf. Angel* v. *Bullington*, 330 U. S. 183, 189-190, 91 L. Ed. 832, 836-837 (1946). The policies underlying the principles of res judicata are fully applicable and no significant countervailing policies have been brought to our attention. *Cf. Restatement, Judgments* §10 (1942); *Restatement, Conflict of Laws* §451(2) (Supp. 1948).

The defendant's brief advances the contention that "the judgment entered in the court below authorizing the taking into custody of monies by the State of New Jersey was entered without due process of law." This contention lacks merit. The defendant was duly served with process, it consented to the entry of the 1960 judgment, and it took no appeal from the 1961 judgment. Constitutional issues are "waivable" (*cf. Roberts Elec., Inc.* v. *Foundations & Excavations, Inc.*, 5 N. J. 426, 429 (1950)) and they are the proper subject of principles of res judicata. See *Chicot County Drainage Dist.* v. *Baxter, supra*, 308 U. S. 371, 84 L. Ed. 329; *Miller* v. *McCutcheon, supra*, 117 N. J. Eq. 123. Due process does not grant the "right to litigate the same question twice." *Baldwin* v. *Iowa State Traveling Men's Ass'n, supra*, 283 U. S. at 524, 75 L. Ed. at 1246. Judge Kingfield expressly determined that judgment of custodial escheat with appropriate reservation of jurisdiction would in nowise violate the due process clause. When the defendant chose not to appeal from the judgment it deliberately subjected itself to the binding effects of res judicata and its underlying policies of finality and stability. See *Baldwin* v. *Iowa State Traveling Men's Ass'n, supra*, 283 U. S. at 525-526, 75 L. Ed. at 1247; *cf. Ackermann* v. *United States*, 340 U. S. 193, 95 L. Ed. 207 (1950). In now seeking to be relieved of the effects of the 1961 judgment, as well as the 1960 judgment, the defendant must necessarily rest on provisions in the judgments themselves or in the applicable court rules enabling such exceptional relief. See R. R. 4:62-2. This it has sought to do under the final point in its brief where it contends that the lower court "abused its discretion and ignored the terms of the

very judgment sought to be vacated in refusing to grant to American the equitable relief it sought."

It is entirely clear that the lower court did not ignore the terms of either the 1960 or 1961 judgment. Both judgments contained reservations of jurisdiction to enable reimbursement in the event of double liability. The defendant has not been subjected to any double liability and is not claiming reimbursement because of any double payment. *Cf. Solimine* v. *Hollander*, 129 N. J. Eq. 264, 273 (*Ch.* 1941). So far as the property dealt within the 1960 judgment is concerned, no state other than New Jersey has ever made or is now making claim. The remaining property was the subject of a claim heretofore made by California but so far as we know California may no longer be pressing its claim; at oral argument counsel for the defendant acknowledged that he had no information indicating that California had taken any action within the past few years or that it has any current interest in the matter. *Cf. State* v. *American Sugar Refining Co.*, 20 N. J. 286 (1956). If California has any current interest it will presumably seek relief in accordance with *Western Union*, joining New Jersey and the defendant as parties to a proceeding before the Supreme Court. In such event, the defendant will clearly be in no jeopardy of double liability or payment. Indeed, it appears to us that in no event can the defendant be placed in any real danger in view of the reservation of jurisdiction; presumably, that was a factor leading the defendant to its conclusion that no appeal should be taken from the entry of the 1961 judgment.

R. R. 4:62-2 authorizes relief from final judgments as therein provided. Motions under the rule are addressed to the discretion of the court and are governed by principles of equity and justice. See *Greenberg* v. *Owens*, 31 N. J. 402, 405 (1960). If in the instant matter equity and justice called for the reopening of either of the judgments we would not hesitate to take appropriate action under subdivision (f) of R. R. 4:62-2. See *Klapprott* v. *United States*, 335 U. S. 601, 614-615, 93 L. Ed. 266, 277 (1949);

Wilford v. *Sigmund Eisner Co.*, 13 N. J. Super. 27, 33 (App. Div. 1951); *Hogan* v. *Hodge*, 6 N. J. Super. 55, 59 (App. Div. 1949); *cf. Hodgson* v. *Applegate*, 31 N. J. 29, 43 (1959); see generally *Ackermann* v. *United States*, *supra*, 340 U. S. 193, 95 L. Ed. 207; *Berryhill* v. *United States*, 199 F. 2d 217 (6th Cir. 1952); *Doyle* v. *Chase Manhattan Bank*, 80 N. J. Super. 105, 124-127 (App. Div. 1963). However, as we view the situation, all the pertinent considerations favor the State rather than the defendant. The res judicata policies of finality and stability are specially applicable since there are admittedly many hundreds of similar escheat judgments outstanding in addition to those entered against the defendant. The claims of New Jersey, as the state of incorporation, to escheat the funds for the benefit of all of its citizens, were clearly superior to those of the defendant, which, though it originally had custody of the funds, had "no moral or legal claim to their retention." *State* v. *American Sugar Refining Co.*, *supra*, 20 N. J. at 297. After the defendant turned the funds over to the State in accordance with the 1960 judgment by consent and the unappealed 1961 judgment, its only interest was its own protection against further liability and payment. It was afforded that protection in ample measure by the specific terms of the judgments and it is indeed difficult to find any sound reason for the making of its present application. The passage of time has served to confirm that New Jersey is the only State interested in the funds dealt with in the earlier judgment and *Western Union* now affords additional protection against any possibility of the defendant being caught between conflicting state judgments with respect to the funds dealt with in the later judgment. The lower court's denial of relief under R. R. 4:62-2 was well within its discretionary authority and its order will not be disturbed.

Affirmed.

APPENDIX C.

Mandate.

SUPREME COURT OF NEW JERSEY.

APPEAL DOCKET No. 4337.

STATE OF NEW JERSEY, by Hugo A. Hilgendorff, Jr., Attorney-at-Law specially designated by the Attorney General of the State of New Jersey,
Plaintiff-Respondent,

vs.

AMERICAN CAN COMPANY, a New Jersey corporation,
Defendant-Appellant.

Civil Action
On Appeal

Mandate on Affirmance

This cause having been duly argued before this Court by Mr. John C. Heavey, Jr., counsel for the appellant and Mr. Charles J. Kehoe, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court-Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court-Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the sixteenth day of March, 1964.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
Mar. 16, 1964
JOHN H. GILDEA
Clerk

A true copy

JOHN H. GILDEA,
Clerk.

APPENDIX D.

Proceedings in New Jersey Supreme Court.

SUPREME COURT OF NEW JERSEY.

No. 4337. SEPTEMBER TERM.

STATE OF NEW JERSEY, by Hugo A. Hilgendorff, Jr., Attorney-at-Law specially designated by the Attorney General of the State of New Jersey, Plaintiff-Respondent, *vs.* AMERICAN CAN COMPANY, a New Jersey corporation, Defendant-Appellant.	Civil Action On Certification ORDER

Pursuant to Rule 1:10-1 it is ORDERED that the appeal from the judgment entered in this cause on April 24, 1963, in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-821-62), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the entry of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the ninth day of October 1963.

Dated October 9, 1963.

JOHN H. GILDEA,
Clerk of the Supreme Court

A True Copy

JOHN H. GILDEA
Clerk

FILED
Oct. 9, 1963
JOHN H. GILDEA
Clerk

SUPREME COURT OF NEW JERSEY

No. A-64 September Term, 1963

On Appeal from Chancery Division—Superior Court.

State of New Jersey, by Hugo A. Hilgendorff, Jr., Attorney-at-Law, Etc.,
Plaintiff-Respondent,

and

American Can Co.,
Defendant-Appellant.

Decided March 16, 1964.

The Chief Justice presiding.

Opinion by Jacobs, J.

	Affirm
The Chief Justice	1
Mr. Justice Jacobs	1
Mr. Justice Francis	1
Mr. Justice Proctor	1
Mr. Justice Hall	1
Mr. Justice Schettino	1
Mr. Justice Haneman	1
Totals	7

December 16, 1963

Re: State of New Jersey v. American Can Company
Docket No. A-821-62

To the Honorable the Chief Justice and
Associate Justices of the Supreme Court
of New Jersey:

We respectfully request permission of the Court to refer at oral argument to the additional citation of *Applestein v. United Board and Carton Corporation*, 35 N. J. 343 (1961) in further support of our argument that the judgment entered on September 16, 1960, had upon it the stamp of finality (Pb 6-14).

Respectfully submitted,

Arthur J. Sills
Attorney General of New Jersey

By: Charles J. Kehoe
Charles J. Kehoe
Deputy Attorney General

cc: Messrs. Carpenter, Bennett & Morrissey
Attorneys for Defendant-Appellant

January 27, 1964

Re: *State of New Jersey* v. *American Can Company*
Docket No. A-821-62.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

At the oral argument on January 20, 1964, Chief Justice Weintraub inquired about the applicability of the doctrine of *res judicata* to the present case.

We respectfully request leave to bring to the Court's attention the following cases: *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948); *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (1931); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Deauville Associates* v. *Murrell*, 180 F. 2d 275 (1950), *cert. denied*, 340 U. S. 821 (1950), *motion for rehearing denied*, 340 U. S. 893 (1950).

In *Sherrer*, husband and wife lived in Massachusetts. Wife left husband and went to Florida. There she obtained a divorce in proceedings wherein the husband appeared generally and denied wife's Florida residence. No appeal was taken by husband. Wife married again and returned to Massachusetts. Husband instituted proceedings in Massachusetts collaterally attacking the Florida decree. Massachusetts held Florida divorce decree void as wife was never domiciled in Florida. United States Supreme Court reversed holding the Florida decree entitled to full faith and credit.

On page 349 of 334 U. S. the Court stated:

> "The question of what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, where the judgment of that court is subsequently subjected to collateral attack on jurisdictional grounds, has been given frequent consideration by this Court over a period of many

years. Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. . .".

This rule has also been applied where a direct attack is made on a judgment. *Deauville Associates* v. *Murrell*, *supra*.

Respectfully submitted,

ARTHUR J. SILLS
Attorney General of New Jersey

By: Charles J. Kehoe
Deputy Attorney General

cc: Messrs. Carpenter, Bennett & Morrissey
Attorneys for Defendant-Appellant

January 28, 1964

Re: *State of New Jersey* v. *American Can Company*

Docket No. A-821-62

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

The Attorney General, representing the Respondent in the above matter, has served upon us a memorandum directing the Court's attention to certain cases relating to the doctrine of *res adjudicata*.

The case cited therein, including *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940) which was alluded to by Chief Justice Weintraub at the argument, stand for the proposition that under certain limited circumstances, jurisdictional issues cannot be relitigated. We have no quarrel with these cases. Nevertheless, they do not stand for the proposition that a Court, which lacks power to adjudicate and determine a particular class of cases, can be vested with such power by application of principles of *res adjudicata*, estoppel or waiver. Indeed, the authorities are to the contrary. *State* v. *Osborn*, 32 N. J. 117 (1960); *State* v. *Bigley Bros., Inc.*, 53 N. J. Super. 264 (App. Div. 1958); *Vorhies* v. *Connizzaro*, 66 N. J. Super. 551 (App. Div. 1961).

Where, as here, the Court that entered the judgment, which Appellant now seeks to set aside, lacked the power to protect the stakeholder in an escheat action from double liability, that power cannot be given to it by the parties. And where judicial power is absent the attempted exercise thereof produces only what we attack here, a void judgment. In short, jurisdictional defects cannot be waived.

Nor do principles of *res adjudicata* render valid a judgment void by reason of its entry in violation of due process requirements under the Federal Constitution. (See cases cited in Appellant's Brief.) This is not a case in which basic

constitutional issues can be properly avoided by such arguments as estoppel of judgment, waiver or *res adjudicata*.

Respectfully submitted,

CARPENTER, BENNETT & MORRISSEY

By: SAMUEL M. COOMBS, JR.

Samuel M. Coombs, Jr.

SMC-20:lj